No. 15810

# United States Court of Appeals

For the Ninth Circuit

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION No. 12, AFL-CIO,

Respondent.

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# Transcript of Record

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**Petition for Enforcement of an Order of the National Labor Relations Board**



Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—3-21-58

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]


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## APPEARANCES

STEPHEN LEONARD,
Associate General Counsel,
National Labor Relations Board,
Washinton 25, D. C.

For the Petitioner.

DAVID SOKOL,
5225 Wilshire Blvd.,
Los Angeles 36, Calif.,

For the Respondent.

## DECISION AND ORDER

On November 6, 1956, Trial Examiner Howard Myers issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief supporting the Trial Examiner. On May 2, 1957, the Board heard oral argument; the General Counsel and the Respondent participated.[1]

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and modifications.

We agree with the Trial Examiner, for the reasons stated in Curtis Bros., 119 NLRB No. 33, that the Respondent Union, by picketing for recognition as the exclusive bargaining representative of the

[1]This case was consolidated for purposes of oral argument, with the Curtis Brothers case, 5-CB-190. The changing parties, although served with notice of the oral argument, failed to appear.

employees of Shepherd Machinery Company and of Brown-Bevis Industrial Equipment Company when it did not represent a majority of the employees of either company, violated Section 8(b)(1)(A) of the Act.[2]

## Order

Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Union of Operating Engineers, Local Union No. 12, AFL-CIO, and its officers, representatives, agents, successors and assigns, shall:

1. Cease and desist from restraining or coercing employees of Shepherd Machinery Company or of Brown-Bevis Industrial Equipment Company in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post in conspicuous places in the Respondent Union's business offices, meeting halls, and all

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[2]The fact that the picketing in both instances was for a union shop, in addition to recognition, neither adds nor detracts from the violation. See International Association of Machinists, Lodge 942, AFL-CIO (Alloy Manufacturing Company, 119 NLRB No. 38). As the complaint herein did not allege a violation of Section 8(b)(2) as to this aspect of the Respondent's picketing, we make no finding in that respect.

places where notices to its members are customarily posted, copies of the notice attached hereto marked "Appendix."[3] Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by official representatives of the Respondent Union, be posted by the Respondent immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail signed copies of the notice attached hereto marked "Appendix" to the Regional Director for the Twenty-first Region for posting, Shepherd and Brown-Bevis willing, at all locations where notices to the Companies' employees are customarily posted. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by authorized representatives of the Respondent, be forthwith returned to the Regional Director for such posting.

(c) Notify the Regional Director for the Twenty-first Region in writing, within ten (10)

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[3]In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

days from the date of this Order, as to the steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., November 4, 1957.

BOYD LEEDOM,
Chairman;

PHILIP RAY RODGERS,
Member;

STEPHEN S. BEAN,
Member;

JOSEPH ALTON JENKINS,
Member,

[Seal] NATIONAL LABOR RELATIONS BOARD.

Abe Murdock, Member, dissenting:

For the reasons stated in my dissenting opinion in the Curtis Brothers case, I dissent in this case.

Dated, Washington, D. C., November 4, 1957.

ABE MURDOCK,
Member,

NATIONAL LABOR RELATIONS BOARD.

## Appendix

### Notice

To All Members of International Union of Operating Engineers, Local Union No. 12, AFL-CIO

PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby give notice that:

We Will Not restrain or coerce the employees of Willard W. Shepherd and Norma D. Shepherd, d/b/a Shepherd Machinery Company, or of Charles E. Skidmore and Milton E. Schwartz, d/b/a Brown-Bevis Industrial Equipment Co., in the exercise of the rights guaranteed in Section 7 of the Act, including the right to refrain from engaging in any or all of the activities guaranteed thereunder.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION No. 12, AFL-CIO.

(Labor Organization.)

Dated.....

By .....

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

## INTERMEDIATE REPORT AND RECOMMENDED ORDER

### Statement of the Case

Upon a charge duly filed on April 18, 1956,[1] by Mrs. Edwin Selvin, herein called Selvin (being Case No. 21-CC-229), and upon a charge duly filed on May 15, by Willard W. Shepherd and Norma D. Shepherd, d/b/a Shepherd Machinery Company, herein called Shepherd[2] (being Case No. 21-CB-805), the General Counsel of the National Labor Relations Board, herein respectively called the General Counsel[3] and the Board, by the Regional Director of the Twenty-first Region (Los Angeles, California), issued his consolidated complaint on July 9[4] against International Union of Operating Engineers, Local Union No. 12, AFL-CIO, herein called Local 12, and on occasions called Respondent, alleging that Local 12 had engaged in, and was engaging in, unfair labor practices affecting commerce, within the meaning of Section 8(b)(1)(A)

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[1]Unless otherwise noted all dates refer to 1956.

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[2]Conjointly Selvin and Shepherd are herein called the charging parties.

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[3]This term specifically includes counsel for the General Counsel appearing at the hearing.

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[4]On the same day, the aforesaid Regional Director, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 6, as amended, issued an order consolidating the above-numbered cases.

and Section 2(6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act.

Copies of the consolidated complaint, the charges, order of consolidation, and notice of hearing thereon, were duly served upon Local 12, Selvin, and Shepherd.

Specifically, the consolidated complaint alleged that Local 12 lost the Board-conducted election held on May 4, among the employees of Shepherd in the unit found by the Board to be appropriate for the purposes of collective bargaining; that on January 24, Local 12 lost the Board-conducted election held among the employees of Charles E. Skidmore and M. E. Schwartz, d/b/a Brown-Bevis Industrial Equipment Co., herein called Brown-Bevis, in the unit found by the Board to be appropriate for the purposes of collective bargaining; that since February 1, Local 12 has picketed at and near Brown-Bevis' plant and since May 14, has picketed at and near Shepherd's plant for the purpose of causing, forcing, or requiring Shepherd and Brown-Bevis to recognize and deal with Local 12 as the exclusive collective bargaining representative of Shepherd's and Brown-Bevis' employees despite the fact that Local 12 never has been designated nor selected as such representative by the employees of Shepherd or of Brown-Bevis; and that the aforesaid picketing by Local 12 is violative of Section 8 (b)(1)(A) of the Act.

Local 12 duly filed an answer denying the commission of the unfair labor practices alleged.

Pursuant to due notice, a hearing was held on August 6 and 7, at Los Angeles, California, before the undersigned, the duly designated Trial Examiner. The General Counsel and Local 12 were represented by counsel. Selvin represented the Charging Parties. Full opportunity was afforded all parties to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, and to file briefs on or before August 28.[5] At the conclusion of the taking of the evidence, Respondent's counsel moved to dismiss the complaint for failure of proof and on further ground that the Board lacked jurisdiction over the parties. Decision thereon was reserved. The motion is hereby denied. Briefs have been received from the General Counsel and from counsel for Local 12 which have been carefully considered.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

## Findings of Fact

### I. The Business Operations of the Employers Here Involved

Shepherd Machinery Company, a partnership consisting of Willard W. and Norma D. Shepherd,

[5]At the request of counsel the time was extended to October 1.

has its principal place of business and offices at Los Angeles, California, where it is engaged in the sale and service of construction and farm equipment. Its annual out-of-state purchases exceed $1,000,000 and its annual out-of-state sales amount to more than $100,000.

Brown-Bevis Industrial Equipment Co., a partnership consisting of Charles E. Skidmore and M. E. Schwartz, has its principal plant and offices at Los Angeles, California, where it is engaged in the sale and distribution of heavy duty industrial and earth moving equipment. Its annual out-of-state purchases exceed $1,000,000 and its annual out-of-state sales amount to more than $50,000.

Upon the entire record in the case, the undersigned finds that, during all times material herein, Shepherd and Brown-Bevis have been, and still are, engaged in commerce within the meaning of the Act.[6]

## II. The Organization Involved

International Union of Operating Engineers, Local Union No. 12, AFL-CIO, is a labor organization admitting to membership employees of Shepherd and of Brown-Bevis.

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[6]See Shepherd Machinery Company, 115 NLRB No. 9 and 115 NLRB No. 107; Casey-Metcalf Machinery Co., et al., 114 NLRB No. 229.

## III. The Unfair Labor Practices

### A. The Pertinent Facts[7]

1. Respondent's Activities at Shepherd.

On August 20, 1947, the Board in Case No. 21-R-3919 (74 NLRB 1284) certified Local 12 as the exclusive representative of Shepherd's employees in a

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[7]Much of the evidence relates to events occurring more than 6 months before the filing of the charges herein and the service of copies thereof. Said evidence was received, not as a basis for any findings of unfair labor practices, but solely for such effect it might have in elucidating, evaluating, and explaining the character and quality of Respondent's alleged illegal conduct after the cut-off dates. It is well settled that Section 10(b) of the Act allows consideration of related acts transpiring prior to the statutory limitation date for the purpose of throwing light on the specific conduct within the period in issue. NLRB v. Clausen, etc., 188 F. 2d 439 (C.A. 3); NLRB v. General Shoe Corp., 192 F. 2d 504 (C.A. 6); Superior Engraving Co. v. NLRB, 183 F. 2d 783 (C.A. 7); NLRB v. White Construction & Engineering Company, Inc., 204 F. 2d 950 (C.A. 5); NLRB v. Ozark Dam Constructors, 203 F. 2d 139 (C.A. 8); Banner Die Fixture Co., 109 NLRB 1401; Florida Telephone Corporation, 88 NLRB 1429; Sun Oil Company, 89 NLRB 833. It is also well settled that to prove Respondent had engaged in unfair labor practices it must be shown that the acts and conduct relied upon occurred within the 6-month period or extended into said period. Joanna Cotton Mills Co. v. NLRB, 176 F. 2d 749 (C.A. 4); Stewart-Warner v. NLRB, 194 F. 2d 207 (C.A. 4); Superior Engraving Co. v. NLRB, supra; Universal Oil Products Company, Inc., 108 NLRB 68.

certain appropriate unit. However, no collective bargaining contract was entered into.

In 1955, Local 12 and Shepherd had several conferences wherein the former sought to obtain, without a Board-conducted election, a union shop contract covering Shepherd's employees. Shepherd refused to bow to the demands of Local 12, maintaining that before it would enter into any agreement Local 12 would have to be certified by the Board.

At the last of the 1955 meetings, which took place in the latter part of April, Shepherd stated that under no circumstances would it enter into any union shop contract with Local 12 unless the employees to be covered by it had voted in favor of such a provision.

On May 23, 1955, Local 12 placed a picket line at the entrances to Shepherd's Los Angeles establishment.[8] The signs carried by the picketeers bore the name of not only Local 12 but also of Teamsters Union Local No. 495.

Pursuant to a petition filed by Shepherd, the Board issued a Decision and Direction of Election (Case No. 21-RM-380) directing that an election be held among Shepherd's employees in the unit found by the Board to be appropriate. Said election was held on May 4, 1956, and of the 138 valid votes cast,

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[8]Shepherd maintains branches at Santa Ana, San Diego, and Lancaster, California. For a brief period of time the Santa Ana establishment, in addition to the Los Angeles one, was picketed by Local 12.

Local 12 received but 45. On May 14, the Regional Director, under whose auspices the election was conducted, issued a certificate to the effect that no labor organization had been selected as the bargaining representative of the employees involved.

Despite the results of the aforementioned election, Local 12 continud its picketing activities, which it had started the previous May, at the Los Angeles premises of Shepherd.

The credible testimony of Willard W. Shepherd, a Shepherd partner, and of Don C. Montgomery, Shepherd's assistant general manager, clearly discloses that at no time since early 1955 did Local 12 recede from its demand that Shepherd recognize and deal with it as the exclusive collective bargaining representative of the latter's employees and that Shepherd execute a contract containing a union shop provision despite the fact that Local 12 well knew that it did not represent the majority of Shepherd employees. This finding is buttressed by: (1) On April 8, 1955, after Local 12 had demanded that Shepherd discuss a contract covering certain Shepherd employees, the latter filed a representation petition to determine the former's majority status (21-RM-347). Three days later, Local 12 filed a disclaimer of interest with the Board and, on April 15, 1955, the Regional Director dismissed the petition; (2) On May 11, 1955, Local 12, together with Teamsters Local 495, wrote Shepherd requesting a meeting "to conclude a work-

able agreement." On May 11, 1955, Shepherd filed a representation petition (Case No. 21-RM-350). The two unions immediately filed disclaimers of interest. In the face of these disclaimers, Shepherd, on May 20, 1955, requested permission to withdraw its petition, and this request was granted by the Regional Director on June 15, 1955; (3) On December 5, 1955, Shepherd filed another representation petition (Case 21-RM-380), presumably because Local 12 was still picketing its Los Angeles establishment, and 2 days later Local 12 filed a disclaimer of interest. The Board (115 NLRB No. 107), after refusing to give credence to the disclaimer because of Local 12's inconsistent conduct of demanding recognition and at the same time picketing Shepherd, directed that an election be held among certain of Shepherd's employees. This election, which took place on May 4, 1956, Local 12 lost by a vote of 93 to 45; (4) On August 2, 1956, four days before the opening of the hearing in the instant proceeding, Alton H. Silcock, a business representative and the person in charge of the picketing as Shepherd's Los Angeles establishment,[9] called upon Montgomery purportedly for the sole purpose of serving a subpoena upon him to appear and testify as a Local 12 witness in the instant proceeding. However, Silcock

[9]The picketing which commenced on May 23, 1955, was still going on at the time of the hearing herein, except for about 10 days during October, 1955. The name of Teamsters Local 495, however, did not appear on the picket signs after the May 4, 1956, election.

made no mention of the subpoena nor did he attempt to serve it until he and Montgomery had conversed for about 45 minutes. Regarding this conversation, Montgomery credibly testified as follows:[10]

He (Silcock) came into the office and after we greeted each other, we sat down and talked about generalities for a minute or two.

Then he suggested that we should execute an agreement now and solve all our differences, I think. One of his phrases was, "Get on the same train."

I asked him as to the nature of an agreement that might be executed. I told him we had discussed agreements at previous times with Mr. Bronson[11]

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[10]In the light of the undersigned's observation of the conduct and deportment at the hearing of Montgomery and Silcock, and after a very careful scrutiny of the record, all of which has been carefully read, and parts of which have been reread and rechecked several times, and being mindful of the contentions of the parties with respect to the importance which each has placed upon the credibility problems here involved, of the fact that in many instances testimony was given about events which took place many months prior to the opening of the hearing, and of the fact that very strong feelings have been generated by the circumstances in this case, the undersigned does not credit Silcock's version of what transpired at the meeting he had with Montgomery on August 2.

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[11]Business Manager of Local 12, and the person who is virtually in charge of all contract negotiations.

and with Mr. Seymour;[12] and we discussed the possibility of a union shop and the possibility of whether or not our employees who did not want to join, would have to join; and he told me that he felt we could sit down and negotiate a union shop at this time without any problems and that those very few who had previously suggested that they did not want to join the union at any time for any reason would probably come along with such an agreement.

He said that all they were concerned with at the present time as Operating Engineers would be the men in our shop; that the other men who voted in the election were extraneous to their particular craft, and therefore, he was talking only about the men in the shop, and wanted an agreement only for them; and he said that we should not continue to disagree and said that a union contract would be the only way for us to get rid of the picket line.

He said that we should sit down, if I remember his words, "Let's sit down, cut a few corners, you and I and Mr. Shepherd can readily negotiate an agreement."

* * *

I explained to him that I felt that we could not execute an agreement based upon the results of the election that had just been held, and he said, "Well, I don't think you should have negotiated an agreement 30 minutes after an election or even 30 days," but he said, "now we can."

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[12]A representative of Local 12.

And I told him that our advice had been that we still could not, based upon the fact that our employees had rejected the union as their representative.

So, he said, "Well, I am not sure * * * I have no legal knowledge * * * Let me call my office."

So he placed a call and talked to a chap who from my memory he called "Mac,"[13] and after [he] talked to "Mac," he said, "Well, they tell me there is no reason in the world why you couldn't execute an agreement right now." He said, "You would first have to dispense with the unfair labor charge pending [in the instant proceeding] then you could immediately negotiate a contract."

Montgomery further credibly testified that when he reiterated that he would follow his counsel's advice and not negotiate a contract "at this time," Silcock remarked,

"Your business would be much better if you did * * * As a matter of fact * * * I have been wanting to buy a blade to put my son in business, but * * * I won't do it with a picket line in effect, and I know a lot of other contractors that feel the same way."

Local 12 contended at the hearing and in its brief that Silcock had no authority to ask [Shepherd] "for any agreement of any kind" and therefore his remarks to Montgomery on August 2, regarding a contract cannot be attributed to Local 12. This

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[13]Harold M. McNeel, Local 12's assistant business manager, treasurer, and director of labor relations.

contention is wholly without merit for the reasons set forth immediately below.

The Act holds a labor organization responsible for the unfair labor practices of its agents just as it holds an employer answerable for the conduct of his agents. The test for determining such responsibility is the law of agency as it has been developed at common law.[14] It is a familiar doctrine of agency that a principal is responsible for the acts of his agents done in furtherance of the principal's interest[15] within the scope of the agent's general authority, even though the principal may not have authorized the acts in question, and may, in fact, even have forbidden them. It is enough if the principal had

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[14]See House Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 11; House Conference Report No. 510 on H.R. 3020, 80th Cong., 1st Sess. p. 36; Senator Taft, Supplementary Analysis of the Act, 93 Cong. Rec. 6858-6859.

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[15]The record is abundantly clear, and the undersigned finds, that Local 12 was opposed to entering into any bargaining contract which did not contain a union shop clause. This finding is supported by the credible testimony of Willard Shepherd who testified that during a conference in the spring of 1955, at which he, Bronson, Seymour, and Montgomery were present, Bronson stated that Local 12 was not interested in any contract not containing a union shop provision, adding that Local 12 had no other kind of bargaining contracts "on their books." The undersigned further finds that when Silcock requested, on August 2, 1956, Montgomery to enter into a union shop contract, he was carrying out one of the prime policies of Local 12.

empowered the agent to represent him in the area in which the agent acted.[16]

2. Respondent's activities at Brown-Bevis

In 1952, Local 12 won a Board-conducted election at Brown-Bevis.[17] After negotiations no agreement on a bargaining contract was reached because, according to the credited testimony of Milton E. Schwartz, a partner in the present partnership of Brown-Bevis and a partner in its immediate successor, Brown-Bevis refused to bow to the demand of Local 12 to enter into a closed shop or a union shop agreement.

In August, 1954, Local 12, in conjunction with Teamsters Local 495, began picketing Brown-Bevis. The picketing, however, was not continuous but was spasmodically conducted for about a year.

As found by the Board in Case No. 21-RM-357 (114 NLRB No. 229), Local 12 and Teamsters Union 495, after consulting with the employees of Brown-Bevis and those of certain other employers engaged in kindred business, wrote, on May 11, 1955,

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[16]In this regard, it is significant to note that during the Silcock-Montgomery conversation of August 2, the former stated that he had been informed by McNeel, "There is no reason in the world why [I] couldn't execute an agreement right now" provided Shepherd withdrew the pending unfair labor practice charges.

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[17]The record also discloses that a Board-conducted election was also held at Brown-Bevis on December 31, 1954, which Local 12 lost.

Brown-Bevis and certain other employers for a meeting for the purpose of discussing a collective bargaining agreement; after receipt of said letters, said employers, including Brown-Bevis, filed separate representation petitions with the Board; between May 17 and May 20, 1955, said unions wrote the Board stating that they did not "claim to represent the majority of the employees" in the claimed units; that shortly after filing said disclaimers of interest, said unions requested the employers who had filed the above-referred-to petitions to sign collective bargaining contracts—but the unions' requests were denied; on May 31, 1955, Local 12 established picket lines at Brown-Bevis, and on various other dates at the plants of certain other employers for whom they had requested recognition; and at the hearing on aforesaid representation petitions (the petitions were consolidated for purpose of hearing, etc.) said unions disclaimed majority representation of the employees involved.

The Board further found in the aforementioned case that the disclaimers of interest filed by Local 12 and Teamsters 495, referred to above, cannot be given credence because, "The Unions disclaimed once when informed of the filing of the present representation petitions, and then almost immediately thereafter negated their disclaimers by demanding collective bargaining negotiations of the Employers. At the hearing the Unions disclaimed again. In the light of the whole record, it is plain that the Unions are playing 'fast and loose' * * *"

Pursuant to the Board's Decision, Order and Direction of Election in Case No. 21-RM-357 (114 NLRB No. 229), an election among Brown-Bevis employees was conducted on January 24, 1956, under the auspices of the Regional Director for the Twenty-first Region which the unions lost by a vote of 37 to 2. Despite the results of said election Local 12 continued to picket Brown-Bevis' premises and said picket line was still there at the time of the hearing herein.[18]

About a week after aforesaid election, Silcock inquired of Charles E. Skidmore, a Brown-Bevis partner, why Brown-Bevis could not "get together with the union and come to an agreement," adding that Brown-Bevis would be "much better off * * * if [it] would get together and sign a union agreement."[19]

The record as a whole establishes, and the undersigned finds, that at no time since the 1952 election has Local 12 receded from its demand for a union shop contract despite the fact that it well knew

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[18]The picketing was continuous from the time it was commenced, May 13, 1955, except for a brief period in October, 1955, but the name of Teamsters Local 495 was deleted from the picket signs immediately after the January, 1956, election.

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[19]The undersigned finds that when Silcock requested a "union agreement" he was referring to a union shop agreement for it was as found above, the policy of Local 12 to accept nothing less than union shop agreements. Furthermore, as found above, the 1952 negotiations broke down because Brown-Bevis refused to enter into a closed shop or a union shop agreement.

that since December 31, 1954, it did not represent the majority of Brown-Bevis' employees in a unit which the Board had found appropriate for the purposes of collective bargaining.

### B. Concluding Findings

The General Counsel contended at the hearing and in his brief that since Local 12 was not the majority representative of the employees of Shepherd and of Brown-Bevis its picketing of the establishments of Shepherd and of Brown-Bevis had for its purpose, in violation of Section 8 (b)(1)(A) of the Act, the causing, forcing, or requiring said employers to recognize and deal with Local 12 as the majority representative of their respective employees in certain appropriate units and to enter into union shop agreements covering said employees. Respondent, on the other hand, contended that since the picketing was peaceful and the object thereof was nothing more than an endeavor upon the part of Local 12 to organize said plants, the activities and conduct of Local 12 in that regard were not violative of the Act.

Section 7 of the Act guarantees to employees the right, among others, to refrain from joining a union, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a)(3) of the Act. Section 8 (b)(1)(A) forbids labor organizations from restraining or coercing employees in the exercise of the rights guaranteed in Section 7.

It is clear from the various disclaimers of interest of majority representation filed by Local 12 with the Board during 1945, 1955, and 1956, and from the results of the various Board-conducted elections held in 1954-1956, that Local 12 for the past 2 years or so had not represented, and does not now represent, the employees of Shepherd and Brown-Bevis for the purposes of collective bargaining. It thus follows that Local 12's purpose of continuing the picket lines at Shepherd and Brown-Bevis after the employees involved had repudiated Local 12 at the polls was not to publicize the facts of a labor dispute but for the purpose of using its economic power to compel Shepherd and Brown-Bevis to bow to its demand for a contract containing a union shop provision. By such pressure Local 12 was in effect coercing Shepherd's and Brown-Bevis' employees in the exercise of certain rights guaranteed them by the Act in contravention of the public policy as embodied in Section 8 (b)(1)(A) of the Act.

The Supreme Court of the United States, within recent years, in cases involving facts similar to those now before us, has condemned the unlawful use of economic power by unions to compel employers to violate the law.[20] For example, in Giboney

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[20]Since the Act protects an employee's right to refrain from any and all forms of union activities, absent a valid union shop contract, the undersigned finds that Local 12's continuous picketing after being defeated at the polls by Shepherd's and Brown-Bevis' employees to be nothing but an attempt on

v. Empire Storage & Ice Co. (336 U.S. 490) and in other related cases,[21] the Court held that picketing is something more than free speech and upheld, as constitutional, state injunctions of peaceful picketing which had been undertaken, as here, for unlawful objectives.

In Giboney, the Court upheld a state injunction against peaceful picketing which, as the Court had found, had as its purpose the forcing a company to violate a state statute. In so holding, the Court said (at page 503) "* * * it is clear that appellants were doing more than exercising a right of free speech or press * * * They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade."

In the Gazzam case, the employer had been asked by the union to sign a contract. None of the employees were members of the union. The employer answered that it was a matter for his employees to decide and gave the union permission to visit and solicit his employees. After meeting and polling the employees, the union was still unsuccessful in get-

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the part of Local 12 to exert economic pressure upon Shepherd and Brown-Bevis in order to force them to coerce their respective employees into joining Local 12 in order to protect their jobs.

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[21]Building Service Union vs. Gazzam, 339 U.S. 532; Hughes, et al. vs. Superior Court, 339 U.S. 460; International Brotherhood of Teamsters vs. Hanke, 339 U.S. 470.

ting a majority of adherents. The union then started to picket the employer's premises and the picketers carried signs "Unfair to organized labor." A second contract was offered by the union which provided that present employees not be required to join the union. This was refused by the employer for similar reasons. The picketing was enjoined by the Washington state courts as a violation of public policy against employer coercion of employees' choice of a bargaining representative as embodied in a state statute very similar in wording to Sections 7 and 8(a)(1) of the Act. The United States Supreme Court, relying on Giboney, upheld the injunction, stating at p. 540:

> * * * Here, as in Giboney, the union was using its economic power with that of its allies to compel respondent to abide by union policy rather than by the declared policy of the state. That state policy guarantees workers free choice of representatives for bargaining purposes. If respondent had complied with petitioners' demands and had signed one of the tendered contracts and lived up to its terms, he would have thereby coerced his employees. The employees would have had no free choice as to whether they wished to organize or what union would be their representative. (Emphasis supplied.)

The Court with reference to free speech said at p. 537:

> But since picketing is more than speech and establishes a locus in quo that has far more po-

tential than inducing action or nonaction than the message pickets can convey, this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity.

Upon the record as a whole, the undersigned finds that the activities and conduct of Local 12, as epitomized above, even though it was in the form of picketing, was illegal restraint and coercion and hence violative of Section 8(b)(1)(A) of the Act.

## IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent, set forth in Section III above, occurring in connection with the operations of Shepherd and Brown-Bevis, set forth in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and, such of them as have been found to constitute unfair labor practices, tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. The Remedy

Having found that the Respondent has violated Section 8(b)(1)(A), it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. International Union of Operating Engineers, Local Union No. 12, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. By picketing certain establishments of Shepherd and of Brown-Bevis for the purpose of coercing and restraining the employees of said employers, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, it is recommended that International Union of Operating Engineers, Local Union No. 12, AFL-CIO, Los Angeles, California, its officers, representatives, agents, successors, and assigns, be ordered to:

1. Cease and desist from restraining or coercing the employees of Shepherd or of Brown-Bevis in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by a lawful agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Post at its offices in Los Angeles, California, copies of the notice attached hereto and marked Appendix. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by representatives of Respondent, be posted immediately upon receipt thereof and maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by other material.

(b) Mail to the Regional Director for the Twenty-first Region copies of the notice attached hereto as Appendix, duly signed by the proper and qualified officers, for posting by Shepherd and Brown-Bevis, they being willing, in places where they customarily post notices to employees. Copies of said notices, to be furnished by the Regional Director for the Twenty-first Region, shall, after being signed as provided for above, be forthwith returned to the said Regional Director for Shepherd and Brown-Bevis' permissive posting.

(c) Notify the Regional Director for the Twenty-first Region, in writing, within twenty (20) days from the date of receipt of this Intermediate

Report and Recommended Order what steps it has taken to comply herewith.

It is further recommended that unless the Respondent within twenty (20) days from the receipt of this Intermediate Report and Recommended Order shall notify said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring Respondent to take the aforesaid action.

Dated this 6th day of November, 1956.

/s/ HOWARD MYERS,
Trial Examiner.

## Appendix

### Notice

To All Members of International Union of Operating Engineers, Local Union No. 12, AFL-CIO

Pursuant to the Recommendations
of a Trial Examiner

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby give notice that:

We Will Not restrain or coerce the employees of Willard W. Shepherd and Norma D. Shepherd, d/b/a Shepherd Machinery Company, or of Charles E. Skidmore and Milton E. Schwartz, d/b/a Brown-

Bevis Industrial Equipment Co., or of any other employer over whom the National Labor Relations Board would assert jurisdiction, in the exercise of the rights guaranteed in Section 7 of the said Act, including the right to refrain from engaging in any or all of the activities guaranteed thereunder, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment made as authorized in Section 8(a)(3) of the Act.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION No. 12, AFL-CIO,

(Labor Organization)

By.....,
(Representative) (Title)

Dated.....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

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[Title of District Court and Cause.]

## RESPONDENT'S EXCEPTIONS TO INTERMEDIATE REPORT

### I.

Respondent excepts to that portion of the Intermediate Report beginning with the word "Shep-

herd" at line 48 on page 2, and ending with the word "Act" on line 3 of page 3, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

II.

Respondent excepts to that portion of the Intermediate Report beginning with the word "In 1955" at line 22, page 3, and ending with the word "Board" on line 26, page 3, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

III.

Respondent excepts to that portion of the Intermediate Report beginning with the word "At" on line 28, page 3, and ending with the word "provisions" on line 31, page 3, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

IV.

Respondent excepts to that portion of the Intermediate Report beginning with the word "On" on line 1, page 4, and ending with the word "No. 495" on line 4, page 4, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

V.

Respondent excepts to that portion of the Intermediate Report beginning with the word "Despite" on line 15, page 4, and ending with the word "Shepherd" on line 17, page 4, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

VI.

Respondent excepts to that portion of the Intermediate Report beginning with the word "The" on line 19, page 4, and ending with the word "representative" on line 46, page 5, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

VII.

Respondent excepts to that portion of the Intermediate Report beginning with the word "In" on line 48, page 5, and ending with the word "August 2" on line 59, page 5, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

VIII.

Respondent excepts to that portion of the Intermediate Report beginning with the word "So" on line 1, page 6, and ending with the word "acted" on line 37, page 6, for the reason that such findings and conclusions are not supported by substantial

evidence in the record considered as a whole, and are contrary to law.

IX.

Respondent excepts to that portion of the Intermediate Report beginning with the word "The" on line 45, page 6, and ending with the word "Local 12" on line 55, page 6, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

X.

Respondent excepts to that portion of the Intermediate Report beginning with the word "In" on line 56, page 6, and ending with the word "charges" on line 60, page 6, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XI.

Respondent excepts to that portion of the Intermediate Report beginning with the word "In" on line 3, page 7, and ending with the word "agreement" on line 8, page 7, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XII.

Respondent excepts to that portion of the Intermediate Report beginning with the word "In" on

line 10, page 7, and ending with the word "year" on line 12, page 7, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XIII.

Respondent excepts to that portion of the Intermediate Report beginning with the word "As" on line 14, page 10, and ending with the word "involved" on line 31, page 7, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XIV.

Respondent excepts to that portion of the Intermediate Report beginning with the word "The" on line 33, page 7, and ending with the word "loose" on line 40, page 7, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XV.

Respondent excepts to that portion of the Intermediate Report beginning with the word "Pursuant" on line 42, page 7, and ending with the word "herein" on line 48, page 7, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XVI.

Respondent excepts to that portion of the Intermediate Report beginning with the word "About" on line 50, page 7, and ending with the word "agreement" on lines 53 and 54, of page 7, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XVII.

Respondent excepts to that portion of the Intermediate Report beginning with the word "The" on line 58, page 7, and ending with the word "election" on line 61, page 7, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XVIII.

Respondent excepts to that portion of the Intermediate Report beginning with the word "The" on line 62, page 7, and ending with the word "agreement" on line 54, page 8, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XIX.

Respondent excepts to that portion of the Intermediate Report beginning with the word "The" on line 1, page 8, and ending with the word "bargaining" on line 6, page 8, for the reason that such

findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XX.

Respondent excepts to that portion of the Intermediate Report beginning with the word "The" on line 10, page 8, and ending with the word "Act" on line 21, page 8, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XXI.

Respondent excepts to that portion of the Intermediate Report beginning with the word "It" on line 30, page 8, and ending with the word "Act" on line 44, page 8, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XXII.

Respondent excepts to that portion of the Intermediate Report beginning with the word "The" on line 46, page 8, and ending with the word "U. S. 490" on line 49, page 8, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XXIII.

Respondent excepts to that portion of the Intermediate Report beginning with the word "Since"

on line 55, page 8, and ending with the word "jobs" on line 63, page 8, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XXIV.

Respondent excepts to that portion of the Intermediate Report beginning with the word "Upon" on line 52, page 8, and ending with the word "Act" on line 55, page 9, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XXV.

Respondent excepts to that portion of the Intermediate Report beginning with the word "The" on line 4, page 10, and ending with the word "commerce" on line 10, page 10, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XXVI.

Respondent excepts to that portion of the Intermediate Report beginning with the word "Having" on line 15, page 10, and ending with the word "material" on line 59, page 10, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

XXVII.

Respondent excepts to that portion of the Intermediate Report beginning with the word "Mail" on line 1, page 11, and ending with the word "action" on line 19, page 11, for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole, and are contrary to law.

## EXCEPTIONS TO RULINGS OF THE TRIAL EXAMINER

At page 135 of the record, the Trial Examiner rejected an offer of proof by respondent in support of the respondent's question shown at page 134 of the transcript, as follows:

> "Do you belong to an association of these equipment dealers?"

to which objection was sustained and an offer of proof made by respondent. The purpose was to show that the respondent was picketing the premises of the employer to inform thte general public that the employer was anti-Labor. The respondent was barred by the Trial Examiner from introducing proof on this allegation which would have substantiated respondent's contention that the picketing was in support of its constitutional right of free speech and was not directed to coercing, restraining or intimidating the employees.

Further, the Trial Examiner erred at page 178 of the record by allowing proof to stand as to proposals

made by the Union. It has been the contention of the General Counsel that the Union had at all times insisted on a Union Security Agreement. Respondent contended that the proposals were in writing and, therefore, that the best evidence relating to any such contention as to any collective bargaining agreement should have been the agreements themselves. At page 178 of the record it was admitted by the employer that the proposals had been in writing. Thereupon respondent moved to strike all of the testimony as hearsay and was not the best evidence, inasmuch as the written proposals were not offered. This motion was denied.

Both of the foregoing rulings of the Trial Examiner were in error because they deprived the respondent of a full and complete hearing and also allowed the introduction of hearsay in violation of the rules of evidence.

For the foregoing reasons, respondent also excepts to the finding that a full and complete hearing was afforded the parties.

Respondent excepts to the findings on page 2 from the words "full opportunity" at line 31 to the word "issues" at line 33.

/s/ DAVID SOKOL,
Attorney for Respondent.

Received November 26, 1956.

[Endorsed]: No. 15810. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. International Union of Operating Engineers, Local Union No. 12, AFL-CIO, Respondent. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed January 22, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15810

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION No. 12, AFL-CIO,

Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq.), hereinafter called the Act, respectfully petition this Court for the enforcement of its order against Respondent, International Union of Operating Engineers, Local Union No. 12, AFL-CIO, and its officers, representatives, agents, successors and assigns. The consolidated proceeding resulting in said order is known upon the records of the Board as "International Union of Operating Engineers, Local Union No. 12, AFL-CIO and Willard W. Shepherd and Norma D.

Shepherd, d/b/a Shepherd Machinery Company, Case No. 21-CB-805" and "International Union of Operating Engineers, Local Union No. 12, AFL-CIO, and Mrs. Edwin Selvin, an Individual, Case No. 21-CC-229."

In support of this petition the Board respectfully shows:

(1) Respondent is a labor organization engaged in promoting and protecting the interests of its members in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on November 4, 1957, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, and its officers, representatives, agents, successors and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to aforesaid Respondent.

(3) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, and pursuant to Rule 34 (7)(a) of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits and

other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, and its officers, representatives, agents, successors and assigns to comply therewith.

Dated at Washington, D. C., this 4th day of December, 1957.

/s/ STEPHEN LEONARD,
Associate General Counsel, National Labor Relations Board.

[Endorsed]: Filed December 6, 1957.

[Title of Court of Appeals and Cause.]

## ANSWER TO PETITION FOR ENFORCEMENT

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The Respondent, International Union of Operating Engineers, Local Union No. 12, AFL-CIO, respectfully answers the Petition as follows:

(1) Respondent admits Paragraph (1) of the Petition that it is a labor organization.

(2) Respondent admits Paragraph (2) of the Petition.

(3) Respondent alleges that the Board's Order and Findings were not based upon any substantial evidence and further alleges that the Board failed to prove that it had jurisdiction to proceed.

Wherefore, Respondent prays this Honorable Court that the Petition for Enforcement be denied.

Dated this 11th day of December, 1957.

/s/ DAVID SOKOL,
Attorney for Respondent.

[Endorsed]: Filed December 16, 1957.

[Title of Court of Appeals and Cause.]

## RESPONDENT'S STATEMENT OF POINTS AND DESIGNATION OF PORTIONS OF RECORD FOR PRINTING

To the Clerk of the Above-Entitled Court and to the Petitioner, National Labor Relations Board:

The following is a concise statement of points on which Respondent intends to rely herein:

### Statement of Points

I.

The Board erred in finding that there was evidence to support the finding that Respondent violated the Act.

II.

The Board erred in its conclusion that the National Labor Relations Act as amended prohibited Respondent from engaging in peaceful picketing as shown by the evidence.

III.

The Board erred in finding that Respondent did not represent a majority of the employees of the companies involved.

IV.

The Board erred in finding that the peaceful primary picketing by Respondent restrained or coerced employees of the companies involved.

V.

The Board erred in finding it had jurisdiction herein.

Designation of Record for Printing

Respondent designates as necessary for the record the following:

All exhibits received and all evidence taken before the Board.

Dated: December 11, 1957.

/s/ DAVID SOKOL,
Attorney for Respondent.

[Endorsed]: Filed December 16, 1957.

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[Title of Court of Appeals and Cause.]

## STATEMENT OF POINTS RELIED UPON BY THE BOARD AND DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, petitioner herein, and pursuant to Rule 17(6) of the rules of this Court, files this statement of points upon which it intends to rely in the above-entitled proceeding, and this designation of parts of the record necessary for the consideration thereof:

### I.

### Statement of Points

1. Substantial evidence on the record as a whole supports the Board's finding that respondent pick-

eted the plants of Shepherd Machinery Company and Brown-Bevis Industrial Equipment Company for the purpose of requiring said companies to recognize respondent as the bargaining representative of their respective employees, and to enter into collective agreements containing union security provisions with respondent, although at the time of the picketing respondent did not represent a majority of the employees of either company.

2. The Board properly held that respondent violated Section 8(b)(1)(A) of the National Labor Relations Act by the picketing described in point 1, above.

3. The Board's order entered in this case is valid and proper in all respects.

## II.

Designation of Parts of the Record to Be Printed

A. The Board's Decision and Order dated November 4, 1957, including the Trial Examiner's Intermediate Report dated November 6, 1956.

B. Respondent's Exceptions to the Intermediate Report.

Dated at Washington, D. C., this 19th day of December, 1957.

/s/ STEPHEN LEONARD,
Associate General Counsel, National Labor Relations Board.

[Endorsed]: Filed December 23, 1957.